Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES MARKHAM

PETITIONER

vs.

THE UNITED STATES OF AMERICA

ELAINE L. CHAO, as Secretary of Labor,
UNITED STATES DEPARTMENT OF LABOR,
JANE DOE, JOHN DOE 2 TO 10, DOE PARTNERSHIP
1 TO 10, and DOE ENTITY 1 TO 10,

RESPONDENTS

On Petition For A Writ Certiorari
To The Supreme Court of the United States

SUPPLEMENTAL APPENDIX

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SUPPLEMENTAL APPENDIX
(REPLACING PRIOR APPENDIX IN ITS ENTIRETY)

THIS SUPPLEMENTAL APPENDIX ADDS THE OPINION OF UNITED STATES DISTRICT COURT, DISTRICT OF HAWAII AT I.1 - I.14

A.1 - A.25 ARE ALL FROM THE PREVIOUSLY FILED APPENDIX, AND CORRECT A PRINTING ERROR IN THE NINTH CIRCUIT OPINION, A. 1 - A. 12

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

JAMES MARKHAM, and as to the third claim, on behalf of others similarly situated, Plaintiff, v. UNITED STATES OF AMERICA; ELAINE CHAO, as Secretary of Labor; U.S. DEPARTMENT OF LABOR; JANE DOE; 2-10; DOE PARTNERSHIPS 1-10; DOE ENTITIES 1-10; MELANIE GALEN; TWO UNKNOWN OWCP CLAIMS EXAMINERS; TWO UNKNOWN OWCP Nurses, *Defendant-Appellees.*	Civ. No. 03-00257 SOM/KSC ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

I. INTRODUCTION.

Plaintiff James Markham alleges that the United

States Department of Labor, Office of Workers' Compensation Programs ("OWCP"), and Melanie Galan, the OWCP claims examiner assigned to Markham's case, violated his constitutional rights in handling his claims for injuries suffered while a federal employee. Markham seeks a declaratory judgment that various OWCP practices are unconstitutional and an injunction against those practices. In addition to asserting his own claim, Markham purports to represent a class that has allegedly been subjected to a similar "campaign of terror" by OWCP. Am. Compl. ¶10.

II. BACKGROUND.

Markham was injured on April 1, 2003, while serving as an electrical worker with the U.S. Department of the Navy. April 23, 2003, OWCP accepted Markham's claim for his work related injuries and authorized continuation of pay and medical benefits. Ex. 2. On May 15, 2003, OWCP notified Markham that a registered nurse had attempted to contact him to set up a meeting and had left him three voicemail messages, none of which had been returned. Ex. 6. OWCP informed Markham that the purpose of the meeting was to assist him in returning to gainful employment and that Markham was required, under the Federal Employees' Compensation Act ("FECA"), to undergo vocational rehabilitation when directed by OWCP. Id. OWCP warned Markham that his FECA benefits would be reduced if he continued his non-cooperation and cited the applicable statutes. Id. See also 5 U.S.C. § 8104(a) (providing that the Secretary

may direct a permanently disabled individual to undergo vocational rehabilitation); §8113(b) (providing that the Secretary may reduce benefits of an individual who without good cause fails to apply for and undergo vocational rehabilitation when directed under § 8104).

After receiving the letter threatening a reduction of benefits for non-compliance, Markham began cooperating with the nurse. As a result of this cooperation, OWCP informed Markham that it would not take punitive action against him for his initial non-cooperation. Ex. 11.

Markham saw Dr. Jason Chang for treatment beginning on May 15, 2003. Chang diagnosed Markham with right shoulder impingement syndrome and cervical strain with radiculopathy, injuries that had not been previously diagnosed or reported to OWCP. On July 30, 2003, OWCP informed Markham and Chang that treatment for these newly diagnosed injuries could not be authorized until Markham provided an explanation of how these injuries were related to his workplace accident. Ex. 15; Ex. C. When Markham provided such information, OWCP authorized treatment for these injuries on August 5, 2003. Ex. 16.

Markham now alleges that his benefits were terminated without a hearing. Am. Compl. ¶12. OWCP vigorously maintains that no termination of benefits ever occurred. Mot. at 1; Exs. 12, 17. The only documentary evidence Markham presents to support his claim of termination is a letter from Galan to Markham's attorney stating that OWCP would not

authorize physical therapy until Markham provided information showing that his injuries were related to his work accident. Am. Compl. ¶19(A);Ex. C.[1] However, upon receiving updated medical information from Markham, OWCP promptly authorized physical

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[1] Markham cited this letter as Ex. B. However, Ex. B is a blank page.

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therapy. Ex. 16. Markham does not specify any other alleged termination of benefits. Moreover, in his litany of relief requested, Markham does not seek the restoration of benefits or any back benefits owed for the period that his benefits were allegedly terminated.[2]

The majority of Markham's complaint focuses on the procedures used and services provided by OWCP. Markham alleges that numerous administrative procedures employed by OWCP violate the constitution. First, he alleges that OWCP violates the constitution by violating Hawaii law in failing to maintain a claims office within the State. Am. Compl. ¶19(B). Furthermore, Markham complains that OWCP uses a Kentucky address, while using a San Francisco phone number, to process his claim. Am. Compl. ¶19(F). Markham alleges that it is "ridiculous" to require him to take part in conference calls, particularly from another time zone, relating to his case, rather than using face-to-face meetings. Am. Compl. ¶15. Markham alleges that OWCP harassed physicians and ruined doctor-patient relationships by refusing to authorize treatment until further

information was obtained. Am. Compl. ¶¶ 14, 15. In sum, Markham alleges that

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[2] At the hearing, Markham initially claimed that he could not tell if benefits had been reduced or not. Markham then conceded that whether benefits had ever been withheld, full restitution has been made.

OWCP perpetuates "a modern system of slavery" with the manner in which it handles claims. Am. Compl. ¶19(J).

To remedy this `modern system of slavery,' Markham seeks equitable relief on numerous grounds. Markham seeks an injunction preventing OWCP from:

> (a) operating in the District of Hawaii, or in any other District, without a fully staffed claims service office with draft authority other than the area within the borders of the State of Kentucky,
>
> (b) [u]sing answering machines, robots, temps, or unqualified individuals to answer telephone inquiries about claims,

(c) servicing OWCP claims in Hawaii from any location away from the District of Hawaii,

(d) employing, or contracting with individuals who have no physical office mailing address or human telephone receptionist to arrange vocational rehabilitation, or provide "nursing" functions,

(e) using San Francisco, or any other out-of-District telephone numbers to respond to claims inquiries,

(f) referring claimants to their Congressional delegation for claims disputes,

(g) referring claimants to out-of-state claims representatives with a Kentucky address, and a San Francisco telephone.

Am. Compl. at 11. Markham further seeks a declaratory judgment that "all statutes, codes proceedings, practice, and agency common-law authorizing administrative remedies by the OWCP are inadequate unconstitutional and void." Id.

Markham further asserts a Bivens action against Galan, alleging that she violated his constitutional rights by conducting conference calls from another time zone. Am. Compl. ¶30(B). Finally, Markham seeks to represent a class of individuals who have been

subjected to similar OWCP policies that are allegedly unconstitutional.

III. STANDARD OF REVIEW.

A motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) may either attack the allegations of the complaint as insufficient to confer subject matter jurisdiction on the court, or attack the existence of subject matter jurisdiction in fact. Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp., 594 F.2d 730, 733 (9th Cir. 1979). When the motion to dismiss attacks the allegations of the complaint as insufficient, to confer subject matter jurisdiction, all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. Fed'n of African Amer. Contractors v. City of Oakland, 96 F.3d 1204, 1207 (9th Cir. 1996).

When the motion to dismiss is a factual attack on subject matter jurisdiction, however, no presumptive truthfulness attaches to the plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the existence of subject matter jurisdiction in fact. Thornhill, 594 F.2d at 733. Accordingly, on a factual attack on subject matter jurisdiction, the court is not restricted to the face of the pleadings, but may review evidence such as affidavits and testimony to resolve factual disputes concerning the existence of jurisdiction. See McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988). Because the party invoking the federal court's jurisdiction has the burden of proving the actual existence of subject matter

jurisdiction, courts have held that the plaintiff must establish jurisdiction with evidence from other sources, such as affidavits or depositions. Trentacosta v. Frontier Pacific Aircraft Industries, Inc., 813 F.2d 1553, 1559 (9th Cir. 1987). This requirement "is the same as that required under Rule 56(e) that the nonmoving party to a motion for summary judgment must set forth specific facts, beyond his pleadings, to show that a genuine issue of material fact exists." Id. Accordingly, affidavits and declarations in opposition to a factual attack on subject matter jurisdiction must be made on personal knowledge and set forth facts that would be admissible in evidence. Fed. R. Civ. P. 56(e).

IV. ANALYSIS.

OWCP contends that this court lacks jurisdiction over Markham's claims. First, viewing the gravamen of Markham's claim as an alleged termination of benefits without notice, OWCP contends that Markham has not suffered an injury in fact because no such termination ever occurred. Mot. at 10. Second, OWCP submits that FECA's statutory scheme precludes review of Markham's claims. Mot. at 12. The court agrees with OWCP's second contention.

FECA establishes a comprehensive and exclusive workers' compensation scheme for federal employees. The Act provides that "the United States will pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty . . ." 5 U.S.C. § 8102(a). The Secretary of Labor has the authority to administer and decide all questions under

FECA., 5 U.S.C. § 8145. The Secretary may formulate rules and regulations necessary to administer the Act. 5 U.S.C. § 8149. OWCP has the discretion to direct an employee to undergo vocational rehabilitation. 5 U.S.C. § 8104. Failure to cooperate may result in suspension of an employee's benefits. 5 U.S.C. § 8113(b).

Congress has foreclosed judicial review of determinations under the FECA. Under 5 U.S.C. § 8128(b):

> The Action of the Secretary or her designee in allowing or denying payment under this subchapter is--
>
> (1) final and conclusive for all purposes and with respect to all questions of law and fact; and
>
> (2) not subject to review by another official of the United States or by a court by mandamus or otherwise.

The Supreme Court has noted that § 8128(b) is an example of Congress using unambiguous language to preclude judicial review. Lindahl v. Office of Personnel Management, 470 U.S. 768, 780 (1985); Staacke v. United States Dept. of Labor, 841 F.2d 278, 281 (9th Cir. 1988). There are, however, two narrow exceptions to the absolute

foreclosure of judicial review. Courts maintain jurisdiction to consider constitutional challenges and to hear claims that a defendant is violating a clear statutory mandate or prohibition. Staacke, 841 F.2d at 281. Only the first exception is even arguably relevant to the present case.

Markham alleges that OWCP violated his constitutional rights. However, alleging constitutional violations does not automatically confer jurisdiction pursuant to the limited exception to § 8128(b). A "mere allegation of a constitutional violation would not be sufficient to avoid the effect of a finality provision." Rodrigues v. United State Dept. of Labor, 769 F.2d 1344, 1348 (9th Cir. 1985). If an allegation of a constitutional violation is "wholly insubstantial," the court does not have jurisdiction over the claim. Paluca v. Sec. of Labor, 813 F.2d 524, 527 (1st Cir. 1987) (citing Bailey v. Patterson, 369 U.S. 31, 33 (1962)); see also Czerkies v. U.S. Dept. of Labor, 73 F.3d 1435, 1442 (7th Cir. 1996) (affirming dismissal of a claim when the "constitutional claim was insubstantial").

Unless Markham raises an arguably substantial claim that his constitutional rights have been violated, this court does not have jurisdiction. Markham alleges that his benefits were terminated without notice. Defendants contend that no termination ever occurred. The only evidence presented that arguably could be read to demonstrate termination is a letter dated July 24, 2003, stating that physical therapy could not be commenced without further information from Markham. Ex. C.

However, the evidence also demonstrates that physical therapy was approved on August 5, 2003. Ex. 16. Assuming arguendo that the initial denial amounted to a termination of benefits, a dubious proposition, the matter was promptly corrected. As Markham does not even allege that he should have received specific benefits in the gap of a week and a half before that "correction," Markham does not even allege facts constituting that a due process violation. See Raditch v. United States, 929 F.2d 478, 481-2 (9th 1991) (holding that violation of procedural rights requires only a procedural correction, not the reinstatement of the substantive right claimed). Markham received the substantive right he sought, physical therapy, not merely a procedural correction.

Markham also alleges that various administrative procedures used by OWCP violate the constitution. These allegations are insubstantial and do not confer jurisdiction. See Paluca, 813 F.2d at 527; Czerkies, 73 F.3d at 1442. FECA vests the Secretary of Labor with plenary authority to "administer, and decide all questions arising under" the Act. 5 U.S.C. § 8145; Staacke, 841 F.2d at 282. The discretion given to the Secretary to make policy choices associated with disability decisions is "virtually limitless." Staacke, 841 F.2d at 282. Given this virtually limitless authority, the Secretary's decision as to the location of OWCP offices or the decision to use answering machines and teleconferences, for example, cannot be said to be unconstitutional.

Markham co.itends that it violates the constitution for the OWCP to fail to maintain an office in the State of Hawaii. Encompassed within the Secretary's virtually limitless authority is the ability to determine that it is more efficient to handle claims from a centralized office. Markham's reliance on Haw. Rev. Stat. § 386-124.5 is misplaced. Section 386-124.5 requires an insurer to maintain a claims service office within the state. Not only is OWCP not an insurer, Hawaii law does not govern the administration of a federal workers' compensation program. FECA is designed as the exclusive remedy for federal employees injured on the job. Any state law that interfered with the administration of this exclusive remedy would be preempted. See e.g. Saul v. United States, 928 F.2d 829, 841 (9th Cir. 1991).

Markham's other allegations of unconstitutional procedures for which he seeks injunctive relief are similarly unfounded. There is nothing constitutionally impermissible about the OWCP's use of a Kentucky address and a San Francisco phone number, or for that matter any long distance number, to administer claims. Nor is it improper for OWCP to use answering machines. Injured workers and their legal representatives do not have a due process right to Lexis or Westlaw access, teleconference facilities, or local phone numbers to contact claim managers. Markham disapproves of many of the procedures established by OWCP, and argues many facilities and accommodations should be provided as a service to injured workers. However, Markham is not the Secretary of Labor. Markham does not have a

constitutional right to his preferred procedures. It is the Secretary who is vested with authority to establish the procedures used to administer OWCP, and the policy choices made by the Secretary are not an unconstitutional exercise of that authority. Markham's allegation that all of OWCP should be declared unconstitutional is without merit.

Markham's asserted Bivens action against Galan similarly fails. Markham has not stated a claim that Galan has violated any of his constitutional rights. The constitution does not forbid conference calls (even if conducted from another time zone), nor does it prohibit out of district individuals from ruling on a claim for benefits. Assignment of a nurse to help coordinate medical care does not violate any liberty interest that may exist in the physician-patient relationship. Even if Markham had properly alleged that a constitutional violation had occurred, Galan would be entitled to immunity unless it could be shown that she violated clearly established constitutional law. See e.g., Gausvik v. Perez, 345 F.3d 313, 816 (9th Cir. 2003). Markham has failed to allege facts sufficient to support a claim that Galan violated clearly established constitutional law.

Since Markham does not properly allege a Bivens action, he is unable to represent a class of individuals who have supposedly-suffered from similar constitutional violations. Moreover, Markham, alleging only numerosity, has failed to make even a minimal showing that the basic prerequisites for class

certification have been met. See Doninger v. Pacific Northwest Bell, Inc., 564 F.2d 1304, 1312 (9th Cir. 1977). Furthermore, Markham's counsel has made no record showing that he can adequately represent the class. See Local Joint Executive Bd. Of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc., 244 F.3d 1152, 1162 (9th Cir. 2001).

V. CONCLUSION.

The motion to dismiss is GRANTED. Section 8102(b) precludes judicial review over FECA decisions except when a movant raises a substantial question of constitutional law. Markham raises wholly insubstantial constitutional challenges and therefore this court grants the motion to dismiss.

DATED: Honolulu, Hawaii, December 22, 2003.

SUSAN OKI MOLLWAY

UNITED STATES DISTRICT JUDGE

Markham v. United States et al., Civ. No. 03-00257 SUN,/KSC; Order Granting Defendants' Motion to Dismiss.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES MARKHAM, and as to the third claim, on behalf of others similarly situated, *Plaintiff-Appellant,*	No. 04-15616
	D.C. No. CV-03-00257-SOM
v.	OPINION
UNITED STATES OF AMERICA; ELAINE CHAO, as Secretary of Labor; U.S. DEPARTMENT OF LABOR; JANE DOE; 2-10; DOE PARTNERSHIPS 1-10; DOE ENTITIES 1-10; MELANIE GALEN; TWO UNKNOWN OWCP CLAIMS EXAMINERS; TWO UNKNOWN OWCP Nurses, *Defendant-Appellees.*	

Appeal from the United States District Court
for the District of Hawaii
Susan Oki Mollway, District Judge, Presiding
Submitted November 22, 2005*
Honolulu, Hawaii
Filed January 17, 2006

Before: Michael Daly Hawkins, M. Margaret McKeown, and Richard R. Clifton, Circuit Judges.

Opinion by Judge McKeown

*This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

SUMMARY

Labor and Employment/Workers Compensation

The court of appeals affirmed a judgment of the district court. The court held that a plaintiff's Federal Employee's Compensation Act (FECA) claims that he was denied due process through a "campaign of terror" that resulted in a threat to reduce compensation benefits without notice were wholly insubstantial, rendering the district court without subject matter jurisdiction.

After complying with a letter warning him that reduction in compensation benefits would continue until he complied in good faith with Office of Workers' Compensation Programs of the United States Department of Labor's (OWCP's) vocational rehabilitation efforts, appellant James Markham filed suit in district court in Hawaii against appellees including the Department of Labor and OWCP. Markham alleged that he was denied

due process through OWCP's "campaign of terror," which resulted in a threat to reduce compensation benefits without adequate pre-deprivation notice or a meaningful opportunity to be heard. Markham also alleged a litany of due process violations in various other OWCP administrative practices and customer service facilities. The district court dismissed Markham's complaint for lack of subject matter jurisdiction under 5 U.S.C. § 8128(b), stating that Markham raised wholly insubstantial constitutional challenges.

Markham appealed.

[1] FECA establishes a comprehensive and exclusive worker's compensation scheme for federal employees. The Act provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty. [2] Section 8128(b) explicitly provides that the courts do not have

jurisdiction to review FECA claims challenging the merits of benefit determinations. [3] Courts retain jurisdiction to consider constitutional challenges or claims for violation of a clear statutory mandate or prohibition. [4] The plain language of the letter provided notice only of a potential reduction of benefits if Markham did not comply with the unambiguous instructions of the letter. The letter was in fact notice of the intended action in the event Markham did not cooperate. Although Markham was never denied benefits, any such challenge was precluded by § 8128(b).

[5] Even assuming there was a transitory denial of benefits for the period of non-cooperation, Markham did not claim he was entitled to any specific benefits during this gap. And any potentially imprudent denial of benefits was corrected when Markham complied with OWCP's rehabilitation requirements. A cognizable due process claim must be more than an ephemeral and insubstantial denial of benefits to which a plaintiff does not claim entitlement. [6] Nor did the district court have jurisdiction under § 8128(b) to review Markham's remaining laundry list of due process claims. [7] Pure policy decisions concerning the administration of FECA are entirely within the discretion of the Secretary of Labor. [8] Mark-ham's purported constitutional claims were wholly insubstantial, rendering the federal courts without subject matter jurisdiction. The judgment of the district court had to be affirmed.

COUNSEL

Stephen M. Shaw, Honolulu, Hawaii, for the appellant.

Edward H. Kubo, Jr., United States Attorney, and Thomas A. Helper, Assistant United States Attorney, United States Department of Justice, District of Hawaii, Honolulu, Hawaii, for the appellees.

OPINION

McKEOWN, Circuit Judge:

In this appeal we consider whether the district court

lacked subject matter jurisdiction over James Markham's complaint alleging constitutional violations in the handling of his injury claim by the Office of Workers' Compensation Programs of the United States Department of Labor ("OWCP"). Markham launches a broad indictment against various policies of the agency, labeling its practices a "campaign of terror." Rhetoric cannot, however, transform an unreviewable administrative practice into a constitutional violation. This case presents a clear example of a litigant making wholly insubstantial constitutional allegations to frame otherwise unreviewable administrative decisions. We affirm the district court's dismissal of Markham's complaint.

BACKGROUND

Markham filed a Federal Employee's Compensation Act ("FECA") claim after he was injured while serving as an electrician with the U.S. Department of the Navy. OWCP accepted Markham's claim and authorized continued compensation and medical benefits. A few weeks later, OWCP notified Markham that he was required to undergo vocational rehabilitation at the direction of OWCP, absent a good reason for not doing so.[1] The letter advised that a nurse had left Markham numerous unreturned voice mail messages trying to set up a time and place to meet and discuss his vocational rehabilitation. The letter warned Markham that if he continued to not cooperate with the nurse without good cause, OWCP would reduce his compensation benefits to zero pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519.[2] In conclu-

[1]Under 5 U.S.C. § 8104, OWCP has the discretion to direct an employee making a FECA claim to undergo vocational rehabilitation.

[2]Section 8113(b) provides:

> If an individual without good cause fails to apply for and undergo

sion, Markham was warned that a reduction in compensation benefits would continue until he complied in good faith with OWCP's vocational rehabilitation efforts.

The letter had its intended effect. Shortly after receiving it, Markham cooperated with the nurse and OWCP and began receiving benefits. OWCP informed him that it would not take action or reduce his benefits for his initial non.-cooperation. Markham concedes that he has received all benefits owed him.

Taking great offense to the threat of reduced benefits, Markham filed suit against the Department of Labor, the Secretary of Labor ("Secretary"), OWCP, and various individuals within OWCP. Markham alleged that he was denied due process through OWCP's "campaign of terror," which resulted in a threat to reduce compensation benefits without adequate pre-deprivation notice or a meaningful opportunity to be heard.

Markham also alleged a litany of due process violations in various other OWCP administrative practices and customer service facilities. For example, Markham claimed that OWCP violates the Constitution by: failing to maintain

a claims office in his home state of Hawaii; requiring that beneficiaries participate in telephone conferences with multiple parties in different time zones; using a Kentucky address and San Fran-

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vocational rehabilitation when so directed under section 8104 of this title, the Secretary [of Labor], on review under section 8128 of this title and after finding that in the absence of the failure the wage-earning capacity of the individual would probably have substantially increased, may reduce prospectively the monetary compensation of the individual in accordance with what would probably have been his wage-earning capacity in the absence of the failure, until the individual in good faith complies with the direction of the Secretary.

Sections 10.519(b) and (c) are similar in scope.

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cisco telephone number for notices and correspondence with beneficiaries in Hawaii; using nurses who lack contact information beyond voice mail; delegating authority to nurses and retaining employees whom he regards as unqualified; and using misleading non-cooperation letters.

To remedy these supposed constitutional violations, Mark-ham seeks an injunction against these practices and a broad declaratory judgment "that all statutes, codes[,] proceedings, practice[s], and agency common-law authorizing administrative remedies by the OWCP are inadequate, unconstitutional and void."

The district court dismissed Markham's complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction under 5 U.S.C. § 8128(b),

stating that "Markham raised wholly insubstantial constitutional challenges." We review de novo the district court's dismissal for lack of subject matter jurisdiction. *Federal Deposit Ins. Corp. v. Nichols*, 885 F.2d 633, 635 (9th Cir. 1989).

DISCUSSION

[1] FECA establishes a comprehensive and exclusive workers' compensation scheme for federal employees. The Act provides that "[t]he United States shall pay compensation .. . for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty ...." 5 U.S.C. § 8102(a). The Secretary has the authority to administer and decide all questions under FECA, 5 U.S.C. § 8145, and may formulate rules and regulations necessary to administer the Act, 5 U.S.C. § 8149.

[2] Section 8128(b) explicitly provides that the courts do not have jurisdiction to review FECA claims challenging the merits of benefit determinations:

> The action of the Secretary or his designee in allowing or denying a payment under this subchapter is –
>
> (1) final and conclusive for all purposes and with respect to all questions of law and fact; and
>
> (2) not subject to review by another official of the United States or by a court by mandamus or otherwise.

5 U.S.C. § 8128(b); *see Staacke v. United States Sec'y of Labor*, 841 F.2d 278, 281 (9th Cir. 1988).

[3] The courts have fashioned two narrow exceptions to this absolute jurisdictional bar. Courts retain jurisdiction to consider constitutional challenges or claims for violation of a clear statutory mandate or prohibition. *Staacke*, 841 F.2d' at 281; *see Rodrigues v. Donovan*, 769 F.2d 1344, 1347-48 (9th Cir. 1985).

[4] Markham's first claim is that his benefits were denied without notice, at least as to the period of his non-cooperation. Besides his own declaration, the only thing that Markham cites to support this allegation is the OWCP non-cooperation letter. This letter does not help Markham, however, because the plain language of the letter provides notice only of a *potential* reduction of benefits *if* Markham did not comply with the unambiguous instructions of the letter. The letter was in fact notice of the intended action in the event Markham did not cooperate. Although Markham was never denied benefits, any such challenge is precluded by § 8128(b).

[5] Recognizing this bar, Markham tries to transform a garden-variety administrative action into a case of constitutional magnitude. Even assuming there was a transitory denial of benefits for the period of non-cooperation, Markham does not claim he was entitled to any specific benefits during this gap of less than two weeks. And any potentially imprudent denial of benefits was corrected when Markham complied with OWCP's rehabilitation requirements. A cognizable due process claim must be more than an ephemeral and insubstan-

tial denial of benefits to which a plaintiff does not claim entitlement. *See Czerkies v. U.S. Dept. of Labor*, 73 F.3d 1435, 1443 (7th Cir. 1996) (en banc) ("The government does not violate the Constitution every time it mistakenly denies a claim for benefits.... This is a case of a claim for benefits `cloaked in constitutional terms.' Czerkies has affixed the constitutional label to a garden-variety claim for benefits plainly barred by 5 U.S.C. § 8128(b)."); *Raditch v. United States*, 929 F.2d 478, 481 (9th Cir. 1991) ("A violation of procedural rights requires only a procedural correction, not the reinstatement of a substantive right to which the claimant may not be entitled on the merits.")

[6] Nor did the district court have jurisdiction under § 8128(b) to review Markham's remaining laundry list of due process claims. FECA vests the Secretary (and hence OWCP) with the authority to "administer, and decide all questions arising under, [FECA]." 5 U.S.C. § 8145. As such, the Secretary's discretion to make policy choices under FECA is "virtually limitless." *Staacke*, 841 F.2d at 282.

[7] Despite being expressed in constitutional terms, Markham's challenges to the administration of FECA claims involve questions of claims processing and customer service, not questions of due process. His effort to hitch these alleged inadequacies to a constitutional star is unavailing. Pure policy decisions concerning the administration of FECA are entirely within the discretion

of the Secretary. Although in certain instances an administrative procedure can give rise to a due process violation, *see Rodrigues*, 769 F.2d at 1348, it is the due process violation and not the administrative procedure that forms a basis for jurisdiction.

Nor can these claims be saved by Markham's complaint that even if the last notice of potential termination never came to fruition, as a consequence of OWCP policies and procedures, he is constantly at risk for a future termination. Apart from the rank speculation inherent in this argument, Markham

has suffered no injury. "[T]he `injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972).

To be sure, it can be frustrating to penetrate a telephone system where the customer is relegated to voice mail. From Markham's standpoint, in a perfect world, he would be able to meet with nurses at a local office in Hawaii. But these purported inconveniences, which he labels a "campaign of terror" and a "modern system of slavery," do not even remotely rise to the level of cognizable constitutional claims.

[8] Markham's alleged constitutional violations are simply a disagreement with the Secretary's

administrative structure and claims process. Sprinkling the brief with multiple due process references and affixing a constitutional label does not change the essence of the claims. Markham's purported constitutional claims are wholly insubstantial, rendering the federal courts without subject matter jurisdiction.

AFFIRMED.

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*** THIS SECTION IS CURRENT THROUGH THE MAY 8, 2003 ISSUE OF ***
*** THE FEDERAL REGISTER ***

TITLE 20 -- EMPLOYEES' BENEFITS
CHAPTER I -- OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT OF LABOR
SUBCHAPTER B -- FEDERAL EMPLOYEES' COMPENSATION ACT
PART 10 - CLAIMS FOR COMPENSATION UNDER THE FEDERAL EMPLOYEES' COMPENSATION ACT, AS AMENDED
SUBPART F -- CONTINUING BENEFITS
RETURN TO WORK -- EMPLOYER'S RESPONSIBILITIES

20 CFR 10.519

@ 10.519 What action will OWCP take if an employee refuses to undergo vocational rehabilitation?

Under 5 U.S.C.' 8104(a), OWCP may direct a permanently disabled employee to undergo vocational rehabilitation. To ensure that vocational rehabilitation services are available to

all who might be entitled to benefit from them, an injured employee who has a loss of wage-earning capacity shall be presumed to be "permanently disabled," for purposes of this section only, unless and until the employee proves that the disability is not permanent. If an employee without good cause fails or refuses to apply for, undergo, participate in, or continue to participate in a vocational rehabilitation effort when so directed, OWCP will act as follows:

(a) Where a suitable job has been identified, OWCP will reduce the employee's future monetary compensation based on the amount which would likely have been his or her wage-earning capacity had he or she undergone vocational rehabilitation. OWCP will determine this amount in accordance with the job identified through the vocational rehabilitation planning process, which includes meetings with the OWCP nurse and the employer. The reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of OWCP.

(b) Where a suitable job has not been identified, because the failure or refusal occurred in the early but necessary stages of a vocational rehabilitation effort (that is, meetings with the OWCP nurse, interviews, testing, counseling, functional capacity evaluations, and work

evaluations), OWCP cannot determine what would have been the employee's wage-earning capacity.

(c) Under the circumstances identified in paragraph (b) of this section, in the absence of evidence to the contrary, OWCP will assume that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity, and OWCP will reduce the employee's monetary compensation accordingly (that is, to zero). This reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of OWCP.

File Number: 132076177
CA1658-D-AL

U.S. DEPARTMENT OF LABOR

EMPLOYMENT STANDARDS
ADMINISTRATION
OFFICE OF WORKERS' COMPENSATION
PROGRAMS
PO BOX 8300 DISTRICT 13
LONDON KY 40742-8300
Phone: (415) 848-6700

May 15, 2003

Date of Injury: 04/01/2003
Employee: James Markham

JAMES MARKHAM
655 PALAWKI ST.
KAILUA, HI 96734

Dear Mr. Markham:

A registered Nurse has attempted to contact you in relation to your claim under the Federal Employees' Compensation Act. The main purpose of this contact is to assist you in returning to gainful employment. Nurse services include (but are not limited to) important steps toward reemployment such as work evaluations,

coordination of medical efforts, and facilitation of efforts between you and your employer. Your refusal without good cause to meet with the nurse and assist in these efforts may be seen as refusal to undergo vocational rehabilitation.

The following specific circumstances support a finding that you are refusing to cooperate with the nurse intervention, and by association, the vocational rehabilitation efforts of the Office of Workers' Compensation Programs (OWCP):

The field nurse left you voicemail messages on 05/06/2003, 05/07/2003 and 05/08/2003 in an attempt to set up a meeting time, date and place but you did not return any of her calls.

PROVISIONS OF THE LAW AND REGULATIONS

The Federal Employees' Compensation Act (FECA) at Section 5 U.S.C. 8104(a) and 8113(b) states that a claimant must undergo vocational rehabilitation when OWCP so directs, unless there is a good reason not to do so. Section 5 U.S.C. 8113(b) and the Code of Federal Regulations at 20 CFR 10. 519 describes what action OWCP will take if a claimant refuses to undergo vocational rehabilitation. You are required to cooperate with the assigned nurse until the completion of the rehabilitation process.

If your current non-cooperation continues, OWCP will reduce your compensation. Unless you produce evidence to the contrary, we will assume that the provision of nurse services would have resulted in return to work with no loss of wage earning capacity, and your compensation will be reduced to zero. This reduction will continue until you comply in good faith with OWCP's directions concerning nurse services. If you do comply, compensation will be resumed, except for the period when you were not cooperating.

DEPARTMENT OF THE NAVY
ATTN: HRO-COMP OFC
PEARL HARBOR NAV. SHPYD AND IMF
667 SAFEGUARD ST STE 100
PEARL HARBOR, HI 96860

Should your compensation be reduced to zero under the provisions of 5 U.S.C. 8113(b) and 20 CFR 10.519, any deductions OWCP is making for health benefits (HB) and/or optional life insurance (OLI) will cease and coverage will be terminated. If compensation is resumed, OWCP will reinstate HB and OLI coverage and deduct any past due premiums from continuing compensation.

REQUIREMENTS FOR RESPONSE

If you wish to cooperate, please immediately contact Jamie Neal at (808) 254-3477.

If you believe you have good reason for not cooperating in this effort, advise this office in writing of your reasons, and provide evidence and argument in support of your position. You have 30 days from the date of this letter to respond. Also, if you believe that nursing services would not have reduced your wage earning capacity to zero, submit evidence to support your position.

WARNING

If you do not comply with the instructions

contained in this letter within 30 days, we will end the rehabilitation effort and reduce your compensation under the provisions of Section 8113(b) and Section 20CFR 10.519 as described above.

If you have any questions, please contact this office using the address or telephone number shown on the previous page.

Sincerely,

C. Melanie Galán
Claims Examiner

ORIGINAL
DOCKETED

FILED
MAR 28, 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES MARKHAM, and as to the third claim, on behalf of others similarly situated,	)	No. 04-15616
Plaintiff - Appellant,	)	D.C. No. CV-03-00257-SOM District of Hawaii, Honolulu
v.	)	
UNITED STATES OF AMERICA; ELAINE CHAO, as Secretary of Labor; U.S. DEPARTMENT OF LABOR; JANE DOE; JOHN DOE, 2-10; DOE	)	**ORDER**

PARTNERSHIPS 1-10;)
DOE ENTITIES 1-10;)
MELANIE GALEN;)
TWO UNKNOWN OWCP)
CLAIMS. EXAMINERS;)
TWO UNKNOWN OWCP)
NURSES,)
)
Defendant - Appellees.)
_____)

Before: HAWKINS, McKEOWN, and CLIFTON, Circuit Judges.

The panel has voted to deny the petition for panel rehearing and to deny the petition for rehearing en banc. The full court has been advised of the petition for rehearing and rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for panel rehearing and the petition for rehearing en banc are denied.

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Cathy A. Catterson
Clerk of Court

(415) 556-9800

Office of the Clerk
United States Court of Appeals for the Ninth Circuit
95 Seventh Street
Post Office Box 193939
San Francisco, California 94119-3939

April 5, 2006

USDC, Hawaii
District of Hawaii (Honolulu)
United States Courthouse
Honolulu, HI 96850

No. Title Agency/D.C. No.

04-15616 Markham v. USA CV-03-00257-SOM

Dear Clerk:

The following document in the above listed cause is being sent to you under cover of this letter.

- *Certified copy of the Decree of the Court*

The record on appeal will follow under separate cover. Please acknowledge receipt on the enclosed copy of this letter.

Very truly yours,

Cathy A. Catterson
Clerk of Court

s/_____
By: Mariam Foreman
Deputy Clerk

Enclosure(s)
cc. All Counsel

UNITED STATES COURT OF APPEAI S

FOR THE NINTH CIRCUIT

JAMES MARKHAM, and as to the third claim, on behalf of others similarly situated,	) No. 04-15616)) D.C. No.) CV-03-00257-SOM
Plaintiff - Appellant,	)
v.	)
UNITED STATES OF AMERICA; et al.,	) **JUDGMENT**
Defendants - Appellees.	)

Appeal from the United States District Court for the District of Hawaii (Honolulu).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Hawaii (Honolulu) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **AFFIRMED**.

Filed and entered 01/17/06